

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RENE MONTEMAYOR,

Defendant-Appellant.

UNPUBLISHED

January 23, 2007

No. 264586

Wayne Circuit Court

LC No. 05-003471-01

Before: Zahra, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of felonious assault, MCL 750.82, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.277b, and domestic violence, MCL 750.81(2). We affirm.

Defendant raises two issues on appeal. First, defendant contends that his counsel's failure to raise intoxication as an affirmative defense to felonious assault constituted ineffective assistance of counsel. Second, defendant argues that there was insufficient evidence to support his convictions. We disagree with both assertions.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. Defendant did not establish a testimonial record at an evidentiary hearing, therefore, review is limited to mistakes apparent on the record. See *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578. Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Decisions as to what evidence to present is a matter of trial strategy. *People*

v Dixon, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Id.* A substantial defense is one which might have made a difference in the outcome of the trial. *Id.*

Based on the record, defendant is unable to demonstrate ineffective assistance of counsel. Defendant argues that his counsel should have raised intoxication as a defense to his felonious assault charge. Defendant essentially likens this to a failure on counsel's part to present evidence. The intoxication defense, however, is a difficult one to raise. The enactment of MCL 768.37 severely limits the ability of a defendant to raise an intoxication defense. The statute provides:

(1) Except as provided in subsection (2), it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.

(2) It is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by the preponderance of the evidence, that he or she voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired. [MCL 768.37].

When interpreting a statute, the court's goal is to ascertain and give effect to the intent of the Legislature. *People v Chavis*, 468 Mich 84, 92; 658 NW2d 469 (2003). The first step is to review the plain language of the statute. If the language is clear and unambiguous, the statute is enforced as written. *Id.*

Under MCL 768.37(1), the plain language indicates that a defendant is prohibited from offering intoxication as a defense where such defense is based on voluntary intoxication with alcohol, drugs, or controlled substances. Under subsection (2), a defendant *may* offer intoxication as a defense to a specific intent crime, but he must show that it was because of a "legally obtained and properly used medication or other substance," and that he "did not know and reasonably should not have known that he or she would become intoxicated" as a result. MCL 768.37(2). In addition, the defendant has the burden of proof of the defense. MCL 768.37(2). Although the case law is not entirely explicit with regard to what is considered an "other substance" in section (2), we conclude that defendant's voluntary consumption of alcohol precludes him from proving that his intoxication resulted from the use of a "legally obtained and properly used medication or other substance" or that he "did not know and reasonably should not have known that he would become intoxicated." See MCL 768.37.

Defendant presented no proof that his intoxication resulted from the use of a legally obtained and properly used medication or other substance. Likewise, defendant offered no proof that he did not know and reasonably should not have known that he would become intoxicated. Defense counsel elicited testimony from defendant that he had been drinking on the night in question and was drunk. Defendant argues that his emotional state was such that the alcohol he drank produced an unpredictable intoxication. This claim is unpersuasive. Intoxication as a

result of drinking multiple beers is not unpredictable or unusual. Defendant voluntarily drank alcohol and then received a ride back to his apartment where he committed the assault. Defendant testified that he knew he was drunk. There is nothing on the record to suggest that defendant was of such a peculiar mental or emotional state such that he should not have reasonably known that he would become intoxicated after drinking alcohol. Therefore, defendant had no valid intoxication defense under subsection (2). Thus, defendant has not overcome the presumption that his counsel's actions were appropriate, or that the verdict would have been different had counsel raised the intoxication defense.

Defendant's second argument on appeal is that there was insufficient evidence to support his convictions given that his intoxication precluded him from having the requisite intent and because the witnesses against him were not credible. When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). This Court reviews the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Defendant's son, Rene, testified that defendant pointed a gun at Rene's forehead and held it there for a long time. Rene testified to being terrified and believing that defendant was going to shoot him. Defendant also pointed the gun at his own head and threatened to kill himself. Defendant all the while yelled at Rene and resisted his wife's efforts to separate him from Rene. Defendant exclaimed "round one" and then fired a shot at Rene's bedroom wall. After firing the shot, defendant asked Rene if he would like him to fire another shot. The testimony of defendant's wife, Guadalupe, corroborates Rene's. This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

The testimony of Rene and Guadalupe strongly suggests that defendant possessed, at the very least, the intent to put Rene in reasonable fear or apprehension of an immediate battery. Intent may be inferred from all the facts and circumstances. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). After examining the record, we conclude that there was sufficient evidence of intent on defendant's part to put Rene in reasonable fear or apprehension of an immediate battery. With regard to the intoxication defense, it does not prove a viable option as defendant is unable to fulfill the stringent requirements of MCL 768.37, as discussed above.

Although defendant challenges the sufficiency of the proofs generally, he does not specifically challenge the sufficiency of the evidence regarding the felony-firearm or domestic violence convictions. Even so, there is sufficient evidence on those matters. The elements of felony-firearm are that defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Assuming there is sufficient evidence to find felonious assault, there is sufficient evidence to find felony-firearm given defendant's admission that he possessed a firearm during the altercation. Domestic assault is a specific intent crime that is proved by establishing that defendant and victim are associated in one of the ways set forth in the domestic assault statute, and that defendant either intended to batter the victim or that defendant's unlawful act placed the victim in reasonable apprehension of being battered. *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996). With regard to the conviction of domestic violence against Rene, there was testimony that defendant pointed a gun at Rene's face and held it there for a long time, angrily grabbed Rene by the wrist and told him to shoot defendant, and then fired a shot at Rene's wall. Finally, defendant and his son Rene are of a sufficient familial relationship as to satisfy the requirement set forth in the domestic assault statute.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Bill Schuette